Supreme Court, U.S.
FILED

05-581 NOV - 3 2005

OFFICE OF

No.

IN THE

Supreme Court of the United States

SILVANA GERMENJI,
ROXHERSI GERMENJI, Minor Child,
Petitioners

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Francois-Ihor Mazur, Esq.
2207 Chestnut Street
Philadelphia, PA 19103
(215) 636-0993
Fax: (215) 636-0993

Attorney for Petitioners

Question Presented

Whether the Third Circuit Court of Appeals exceeded the scope of its review and went against long-established principles of administrative review when, in upholding the decision of the Board of Immigration Appeals ("BIA"), it substituted its own factual findings for those of the BIA and then applied the law to such factual findings.

Parties to the Proceedings

The parties to the proceedings in the Third Circuit Court of Appeals included the Attorney General of the United States and the petitioners Silvana Germenji and Roxhersi Germenji, a minor child. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Silvana Germenji and Roxhersi Germenji, respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the Third Circuit Court of Appeals, filed on June 7, 2005, the petition for rehearing of which was denied by such court on August 5, 2005.

Opinions Below

The opinion of the Third Circuit Court of Appeals, which is the subject of this petition, was filed on June 7, 2005, and is attached as Appendix A. Although not selected for publication in the Federal Reporter, it appears at 132 Fed.Appx. 990 (3d Cir. 2005).

The decision of the Board of Immigration Appeals, dated February 5, 2005, is attached as Appendix B.

The decision of the Immigration Judge, dated July 8, 2002, is attached as Appendix C.

The Third Circuit Court of Appeals one-page order, dated August 5, 2005, denying panel rehearing and rehearing *en banc* is attached as Appendix D.

Jurisdiction

The decision of the Third Circuit Court of Appeals to be reviewed was filed on June 7, 2005. That court denied panel rehearing and rehearing *en banc* on August 5, 2005. This petition is filed within 90 days of that date. Rules 13.1 and 13.3. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

Statutory Provisions Involved

1. Section 101(a)(42)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means * * * any person who is outside any country of such person's nation[ality] or, in the case of a person having no nation[ality], is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

2. Section 1252 of Title 8 of the United States Code (1996)[1] provided in pertinent part:

> Judicial Review of Orders of Removal
>
> * * * * *
>
> (b) Requirement for Review of Orders of Removal
>
> * * * * *
>
> (4) Scope and standard for review
>
> > ***(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
> >
> > (B) the administrative findings of fact are conclusive unless any reasonable adjudicator

[1] Amended by §101(e) [revising (b)(4)] and §106(a) [revising (b)(9)] of REAL ID Act, P.L. 109-13 (5/11/05). Such amendments apply, to the extent relevant here, to asylum applications made after the date of enactment of the REAL ID Act. The analysis of this case would not be materially affected by these amendments.

would be compelled to conclude to the contrary[.]

3. Section 208 of the INA, 8 U.S.C. 1158, provides in pertinent part:

Asylum

(a) Authority to Apply for Asylum

***(1) Any alien who is physically present in the United States or who arrives in the United States ***, irrespective of such alien's status, may apply for asylum in accordance with this section[.]

*****

(d) Asylum Procedure

(1) *** The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a).

Statement of the Case

1. Summary of Law

The INA defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct such as participating in persecution or committing a particularly serious crime. 8 U.S.C. §1158(b)(1) and (2).

The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. §1158(b)(1).

Congress has authorized the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. 1158(b)(1).

An alien who is charged with being removable from the United States may present an asylum claim as a defense to removal. *See generally* 8 C.F.R. 208.2-208.5. Such a claim, and other issues relevant to whether the alien will be removed from the United States, are decided by an immigration judge after a hearing. *See* 8 C.F.R. 208.2(b) and (c). The asylum decisions of immigration judges are appealable to the Board of Immigration Appeals ("BIA"), which has the power to conduct a de novo review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. *See* 8 C.F.R. 1003.1. A finding by the BIA that an asylum applicant failed to carry his burden of proof is reviewable, on judicial review of the final order of removal entered against the alien, by the federal court of appeals for the circuit in which the immigration judge's hearing was held. *See* 8 U.S.C. 1252(b)(2) (1996).

Judicial review of the BIA's decisions, including those addressing asylum issues, is limited by statute. See 8 U.S.C. 1252(b)(4)(1996). Most important here, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based," 8 U.S.C. §1252(b)(4)(A), and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. §1252(b)(4)(B).

2. Summary of Facts

Silvana Germenji was born in Tirana, Albania on November 24, 1966 in a small basement apartment. A.R. 361, 364. Since her birth, Silvana was exposed to government persecution and life long struggles as her family actively supported the anti-government movements in Albania. Members of her family were tortured, imprisoned and even killed because they opposed the Communist regime.

As an adult, Silvana and her husband attended rallies and protests organized by the Democratic Party of Albania, an anti-communist political party. A.R. 361.

After the Democratic Party was elected into power in Albania in March 1992, Silvana's husband was employed by the Ministry of Finance ("MOF") as a chief director of tax registration. His responsibilities included, among other things, inspection of companies within Tirana and the monitoring of companies' compliance with national tax laws. A.R. 361-62.

In June 1997, the Socialist Party, comprised of many former Communists, won elections held in Albania. A.R. 361. In early 1998, while on the job, Silvana's husband inspected a company called "Magjik Bingo". He found that the company had been falsifying its tax returns and hiding income to avoid taxation by the government. Silvana's husband immediately reported these irregularities to the MOF. Silvana's husband was told by his superior to ignore the company's violations because they had connections with "those above". AFFI 2. He was further told that the head of Magjik Bingo was a Socialist with strong connections to the Socialist Party's leader, Fatos Nano. By reporting the company to his boss, Silvana's husband exposed himself and his family to great danger. Although the Communists were no longer held formal power in Albania, many former party

leaders continued to operate within the ruling Socialist party. A.R. 362.

Following the inspection of Magjik Bingo by Silvana's husband, there followed a campaign of threats and harassment against the family. These included threatening telephone calls and the demotion of Silvana's husband at the MOF. Fearing for their safety, the family fled to Greece in 1998 where they stayed for two years. In August 2000, only a few months after returning to Albania, Silvana was attacked in the street. From the statements made by her assailants, it was clear to Silvana that the attack was connected to her husband's inspection of Magjik Bingo. A.R. 362.

Soon after the attack on her, Silvana and her husband made plans for her and their only child, Roxhersi Germenji, to leave Albania as soon as possible. She bought fake documents for herself and her son, and quickly left the country. A.R. 362.

3. Proceedings to Date

The Petitioners received a positive credible fear determination on September 27, 2000 in San Francisco, California, the port of their attempted entry into the United States. Subsequent to such determination, the Petitioners were released from immigration custody. A.R. 40.

At a hearing held on July 8, 2002, the Immigration Judge ("IJ") denied the Petitioners' applications for asylum withholding of removal and withholding of removal under the Convention Against Torture. The primary basis for the IJ's decision was his finding that Silvana was not credible. App., *infra*, A-18.

The Petitioners timely appealed the IJ's decision to the BIA. In its decision dated February 5, 2004, App., *infra*,

A-5 – A-9, the BIA did not make any findings of its own on the issue of credibility. In addition, the BIA did not affirm the IJ's determination or defer to the IJ on this issue. *Id.* Under applicable Third Circuit precedent, because that court's power of review extends solely to decisions of the BIA, the decision of the IJ, including the credibility determination, is only reviewed when the BIA expressly adopts or defers to the findings of the IJ. *See Kayembe v. Ashcroft*, 334 F.3d 231 (3d Cir. 2003).

Although it did not adopt, or defer to, the IJ's credibility determination, the BIA dismissed the Petitioners' appeal. The BIA held that the anti-corruption efforts of Mrs. Germenji's husband in exposing the tax fraud of Magjik Bingo could not serve as a basis for establishing a nexus between the Petitioners' political beliefs and the persecution they suffered as a consequence. App., *infra*, A-8. Thus, the central issue on review was whether efforts aimed against political corruption can serve as a basis for asylum protection on account of political opinion.

Implicitly, the BIA characterized the issue before it as whether there was a nexus between the opposition of the Petitioners' family against the former totalitarian communist regime of Albania, which regime the Socialist party of Albania is the ideological and *de facto* successor, and the persecution the Petitioners suffered as a result of Mrs. Germenji's husband's actions against the tax fraud perpetrated by Magjik Bingo. The BIA did not address, and apparently did not appreciate, that the anti-corruption actions themselves could provide a political basis for asylum protection under the INA. Thus, the BIA found as follows:

> [T]he mere involvement of Socialist Party members in this business is insufficient to establish a nexus between the respondents' political opinion and the threats that the respondents received. *See Elias-*

> *Zacarias*, [502 U.S. 478 (1992)], 483. The respondents must establish that the executives of Magjik Bingo were motivated to persecute the respondents because of a political opinion that the respondents possess, or are believed to possess. *See Id.* In this matter, it appears that the threats the respondents received and the harm the lead respondent suffered were motivated solely by Magjik Bingo's fear that the lead respondent's husband would reveal the tax fraud c mmitted by Magjik Bingo, rather than the respondents' political opinion.

App., *infra*, A-8.

The Petitioners timely filed a Petition for Review with the Third Circuit Court of Appeals. In its unreported decision filed June 7, 2005, App., *infra*, A-1 – A-4, the Third Circuit denied such Petition. In its opinion, the Third Circuit restates the BIA's holding on the nexus issue by using language that obscures the BIA's error and then adds a factual finding not present in the record or in the BIA's opinion:

> The BIA concluded that petitioners' evidence did not support the required nexus between the threats, harassment or attempted kidnaping and Germenji's political opinion or membership in a social group. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992)[parallel citations omitted]. That conclusion is supported by substantial evidence.
>
> Germenji claimed that she suffered past persecution on account of her husband's failure to refrain from investigating the perceived irregularities in the tax records of "Magjik Bingo" and that he was warned that the company had ties to leaders of the Socialist Party. However, the evidence that Germenji offers in support of her request for relief is

> insufficient to connect the mistreatment she suffered upon returning to Albania to the Albanian government or groups the government either controls or is unable to control. Rather, it is just as likely that Germenji was accosted and threatened by agents of Magjik Bingo without instigation of, or inaction by, representatives of the government.

App., *infra*, A-2 – A-3.

The BIA's decision does not support the foregoing discussion in the Third Circuit's opinion. Nowhere does the BIA state or find that representatives of the government did not instigate the harm against the Petitioners. To the contrary, the BIA states that "the mere involvement of Socialist Party members in this business is insufficient to establish a nexus between the respondents' political opinion and the threats that the respondents received." The BIA's exact language demonstrates that it ignored the central issue in the Petitioners' case: whether retaliation by the government against those opposed to government corruption may constitute political persecution. Therefore, the BIA could not find a political nexus. The BIA ignored this issue and rendered a decision based on a finding that there was no nexus between the past persecution suffered by the Petitioner's family under the Socialist Party's predecessor, the Communist party that had ruled the Albanian dictatorship, and the persecution suffered by the lead Petitioner and the threats made against her husband, Mr. Germenji. Thus, the BIA held that the "mere involvement of Socialist Party members" in a corrupt enterprise and the fear that its tax fraud would be revealed could not, by itself, provide a political ground upon which asylum may be based. By misstating the BIA's findings, the Third Circuit failed to address the BIA's errors and the basis for the petition for review.

The Third Circuit additionally found that although the Petitioners established mistreatment on account of kinship ties with the lead Petitioner's husband, the Petitioners did not establish a connection between their mistreatment and the Albanian government or group the Albanian government is unable or unwilling to control. Consequently, the Petitioners did not establish persecution based on family associations (the "social group"). App., *infra*, A-3 (citing *Fatin v. INS*, 12 F.3d 1233, 1238-39 (3d Cir. 1993), where the Third Circuit adopted the definition of "particular social group" set forth in *In re Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) to include persecution on account of an individual's "kinship ties".). This aspect of the Third Circuit's decision essentially repeats the error relating to the nexus issue described above.

Reasons for Granting the Petition

The question presented for review in this case is whether the Third Circuit Court of Appeals exceeded the scope of its review and went against long-established principles of administrative review when, in upholding the decision of the BIA, it substituted its own factual findings for those of the BIA and then applied the law to such factual findings.

The Third Circuit misstates the BIA's decision as being based on a conclusion that the evidence did not support a factual finding that there was a connection between the Albanian government, or a group the Albanian government could not control, and the harm to the Petitioners by agents of Magjik Bingo.

The factual findings set forth by the BIA, however, specifically recognize that members of the Socialist Party were involved in the business of Magjik Bingo. Nevertheless, the BIA found that executives of Magjik Bingo

were motivated to harm the Petitioners "solely by Magjik Bingo's fear that the lead respondent's husband would reveal the tax fraud committed by Magjik Bingo, rather than the respondents' political opinion." A.R. 9 (BIA Opin.) The BIA then cites to *INS v. Elias-Zacarias*, at 483, for the proposition that the Petitioners must establish that the executive of Magjik Bingo were motivated to persecute them because of their political opinion. A.R. 9 (BIA Opin.) The issue as defined by the BIA was therefore not factual, as the Panel described it, but legal. Specifically, the BIA did not recognize that the lead Petitioner's husband's investigation of the Magjik Bingo tax fraud could be deemed political for asylum purposes, notwithstanding the links Magjik Bingo had with corrupt government officials who sought to protect their business interests. Thus, the BIA answered the question as to whether anti-corruption actions can provide a basis for asylum in the negative. It concluded that the necessary nexus as required by *Elias-Zacarias* was absent because the motive of the Magjik Bingo executives in harming Petitioners was fear of the company's tax fraud being revealed rather than because of their political opinion, without ever acknowledging that these two motivations may be one and the same.

The Third Circuit's decision misstates the BIA's cite to *Elias-Zacarias* as standing for the proposition that the Petitioner's evidence was not sufficient to support a finding that Socialist party members were actively connected to Magjik Bingo. Hence, the Third Circuit's reference to the BIA as concluding that "the petitioners' evidence did not support the required nexus between the threats, harassment or attempted kidnaping and Germanji's political opinion or membership in a social group." Slip op. at 3, citing *Elias-Zacarias*, at 483. The Third Circuit relied on *Elias-Zacarias* for the proposition that evidence of motivation is required, claiming, incorrectly, that no motive was found by the BIA, whereas the BIA relied on *Elias-Zacarias* for the proposition

that the motivation must be political and that corrupt officials' fear of exposure is an inherently non-political motivation. Thus, the BIA found that although Socialist Party members were involved in Magjik Bingo, and that acted against Silvana's husband because they feared exposure of their fraud, the BIA found that such a motive could not provide a political basis for asylum.

The Third Circuit's decision is in conflict with a long-established principle of administrative law, that the administrative agency's decision must be upheld, if at all, solely on the grounds invoked by that agency. "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)(Chenery II).

The Court has stated previously in the immigration context that "the law entrusts the agency to make the basic asylum eligibility decision here in question." *INS v. Ventura*, 537 U.S. 12, 16 (2002)(*citing* the INA as well as *Elias-Zacarias*, at 481 and *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999)). The Court in *Ventura* then quotes *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)(*Chenery I*), stating, "[i]n such circumstances a 'judicial judgment cannot be made to do service for an administrative judgment'. . . . Nor can an 'appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency.'" *Ventura*, at 16 (citations omitted), *quoting Chenery I*, at 88. In the past, the Third Circuit has recognized this requirement in the immigration context. For example, in *Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004), a case dealing with asylum, the Third Circuit held that it "may not affirm the exclusion of evidence on grounds entirely different from those relied upon by the agency." 372 F.3d, at 534.

In this case, however, the Third Circuit's interpretation of the BIA's decision ignores the legal basis for such decision and substitutes a factual finding not present in the BIA's decision or in the evidentiary record. By interpreting the BIA's decision to have a different meaning than that which it actually has, the panel substituted its judgment for the BIA's. Under the INA, it is for the Attorney General to make the decisions in the first instance, not a panel of this Court. 8 U.S.C. §1158 and 8 U.S.C. §1252(b)(4).

To the extent that the Third Circuit affirmed the BIA's decision that, as a matter of law, anti-corruption actions do not provide a political basis for asylum, *Chenery* requires that it do so explicitly. In at least one previous case, the Third Circuit apparently has recognized that such a basis for asylum exists. In its unpublished decision, *Derevianko v. Reno*, 55 Fed.Appx. 609, 614 (3d Cir. 2003), the Third Circuit stated that "[t]he IJ expressly found, and the BIA did not disagree, that for purposes of Derevianko's asylum claim, the persecution alleged by him as a result of his "whistle-blowing" against official corruption would constitute persecution due to his political opinion." Certainly, given the absence of previous guidance from the BIA regarding this issue, and given the absolute absence of analysis by the BIA regarding this issue in the Petitioners' case, the Third Circuit should at least have remanded the matter to the BIA so that it could apply its own expertise to this issue. As stated in *Ventura*, "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principal has obvious importance in the immigration context." 537 U.S., at 16-17.

Both the Attorney General and the Respondents addressed in their respective briefs the issue of whether anti-corruption efforts can serve a basis for claiming asylum on

account of political belief. *See, e.g., Respondent's Brief*, at 30-32, and *Petitioners' Brief*, at 26, The BIA disposed of this issue without analyzing it, and the Third Circuit, on review, imposed new factual findings not supported by the BIA's own findings when it upheld the BIA's decision on a different basis.

Conclusion

The petition for a writ of certiorari should be granted.

Appendix A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No: 04-1531

SILVANA GERMENJI;
ROXHERSI GERMENJI, Minor Child,
Petitioners
v.
ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA,

On Appeal from the Immigration and Naturalization Service
District No: A78-191-374

Submitted Pursuant to Third Circuit LAR 34.1 (a)
May 5, 2005

Before: McKee, Smith, Van Antwerpen, Circuit Judges

OPINION

(Filed: June 7, 2005)

McKee, Circuit Judge.

Silvana Germenji appeals the decision of the Board of Immigration Appeals for herself and her minor child. The BIA affirmed the decision of an Immigration Judge denying their request for asylum and withholding of removal. For the reasons that follow, we dismiss the petition for review.

The BIA's opinion must be upheld if it is supported by substantial evidence on the record. *Abdille v. Ashcroft*, 242 F.3d 477, 483 (3d Cir. 2001). "Substantial evidence is

more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Senathirajah v. INS*, 157 F.3d 210, 216 (3d Cir. 1998). We will uphold the BIA's determination "unless any reasonable adjudicator would be compelled to conclude to the contrary". 8 U.S.C. § 1252 (b)(4)(B).

An alien moving for asylum or withholding of removal must establish that she is a "refugee."8 C.F.R. §208.13(a). "Refugee," is defined as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A).

The "well founded fear" requirement is satisfied by establishing a subjective fear supported by an objectively real possibility of persecution upon the return to one's native country. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31(1987). If an alien successfully demonstrates past persecution, we will presume a well founded fear of future persecution absent evidence of changed circumstance. However, that presumption is rebuttable. 8 C.F.R. §208.13(b)(1).

Here, the BIA concluded that Germenji had not satisfied her burden of establishing past persecution because of any protected classification or trait. A.R. 9. The BIA

concluded that petitioners' evidence did not support the required nexus between the threats, harassment or attempted kidnaping and Germenji's political opinion or membership in a social group. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). That conclusion is supported by substantial evidence.

Germenji claimed that she suffered past persecution on account of her husband's failure to refrain from investigating the perceived irregularities in the tax records of "Magjik Bingo" and that he was warned that the company had ties to leaders of the Socialist Party. However, the evidence that Germenji offers in support of her request for relief is insufficient to connect the mistreatment she suffered upon returning to Albania to the Albanian government or groups the government either controls or is unable to control. Rather, it is just as likely that Germenji was accosted and threatened by agents of Magjik Bingo without instigation of, or inaction by, representatives of the government.

The BIA's determination that Germenji did not establish a fear of persecution based upon family associations (the "social group") is also supported by substantial evidence. Germenji's social group claim hinges on an attack she experienced in August 2000. She testified that one of the attackers yelled, "We warned your husband that we are watching and that we do no forget anything ... Tell him to be careful!" In *Fatin v. INS*, 12 F.3d 1233, 1238-39 (3d Cir. 1993), this Court adopted the definition of "particular social group" set out in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), wherein the BIA stated that persecution on account of an individual's "kinship ties". Here, Germenji's testimony seems to establish mistreatment on account of her kinship ties with her husband. However, as noted, she did not establish a connection between this mistreatment and the Albanian government or groups the government is unable or unwilling to control.

Withholding of removal requires that the applicant demonstrate by a "clear probability" she will be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion upon return to her native country. *INS v. Stevic*, 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). Since this is a higher standard than required for asylum, Germenji's claim for withholding of relief falls with her asylum claim. *Lukwago v. Ashcroft*, 329 F.3d 157, 182 (3d Cir. 2003).

We therefore must dismiss Germenji's petition for review.

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A78 191 373 – Philadelphia Date: FEB 05, 2004
A78191374

In re: SILVANA GERMENJI
ROXHERSI GERMENJI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Cherylle C. Corpuz, Esquire

ON BEHALF OF DHS:
Pamela D. Ransome, Assistant Chief Counsel

CHARGE:
Notice:
Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)]
Fraud or willful misrepresentation of a material fact
(A78 191 373)
Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C1182(a)(7)(A)(i)(I)]
Immigrant - no valid immigrant visa or entry document
(A78 191 374)

APPLICATION: Asylum; withholding of removal;
Convention Against Torture

ORDER:

PER CURIAM. The respondents have appealed from the Immigration Judge's decision dated July 8, 2002. The Immigration Judge denied the respondents' applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act and for relief under the Convention Against Torture. The Immigration Judge determined that the lead respondent failed to provide credible testimony in support of the respondents' application for asylum. On appeal, the respondents argue that the lead respondent provided credible testimony establishing the respondents suffered past persecution and have a well-founded fear of return to Albania on account of their political opinion and their membership in a particular social group. The respondents are a mother and son. The respondents' appeal will be dismissed.

Even had the lead respondent presented credible testimony in support of the respondents' application for asylum, we fund that the respondents have failed to meet their burden of proof to establish that the harm they suffered was on account of an enumerated ground of persecution under the Act. An applicant for asylum or withholding of removal must establish that the persecution he or she suffered. or fears, is on account of his or her race, nationality, religion, membership in a particular social group, or political opinion. The alien need not show conclusively what the motive for the persecution was, or may be. *See Matter of S-A-*, 221&N Dec. 1329 (BIA 2000). Nor must he or she show that the persecutor was or may be solely motivated by a protected ground. Rather, the applicant must produce evidence from which it is reasonable to conclude that the harm was motivated, at least in part, by an actual or imputed protected ground. *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). The alien need not provide direct proof of a persecutor's motive, but must provide some evidence, either direct or circumstantial, of those motives. See *INS v Elias-Zacarias*, 502 U.S. 478, 483 (1992).

In this matter, the respondents maintain that they have suffered past persecution and have a well-founded fear of persecution on account of their anti-government political opinion. In this regard, the lead respondent testified that her husband was employed as the Chief of the Department of Taxation in the Albanian Ministry of Finance (Tr. 45). The lead respondent maintains that while examining the tax records for Magjik Bingo, her husband discovered that the business was not in compliance with the Albanian tax laws (Tr. at 47). The lead respondent testified that her husband reported the irregularities to his boss, who warned him to cease his examination of the records because the business has connections with Socialist Party leaders (Tr. at 48). Despite the warning, the lead respondent's husband continued to investigate the tax fraud (Tr. at 51). The lead respondent testified that her husband began to receive numerous phone calls at home, threatening that that his wife and son will be kidnapped, if he does not cease the investigation (Tr. at 51). Subsequently, the lead respondent's husband was demoted from his job (Tr. at 52). As a result of the threats, the lead respondent's family fled to Greece, where they remained for 2 years, before returning again to Albania (Tr. at 54-55). The lead respondent testified that subsequent to their return, she was assaulted by three men, who tried to force her into a vehicle (Tr. at 59). The lead respondent testified that the men told her that this was for her husband (Tr. at 59). After she was aided by neighbors, the men released her, but threatened that they would return again (Tr. at 62). The lead respondent and her son fled to the United States in September 2000 (Tr. at 65).

We find that the respondents have failed to establish that they suffered past persecution or have a well-founded fear of return to Albania on account of their anti-government political opinion. The respondents have failed to establish that the threats that they received and the harm they suffered was on account of a political opinion held by the respondents. While

the lead respondent testified that the company her husband was investigating for tax fraud had connections to the Socialist Party, the mere involvement of Socialist Party members in this business is insufficient to establish a nexus between the respondents' political opinion and the threats that the respondents received. *See Elias-Zacarias, supra*, at 483. The respondents must establish that the executives of Magjik Bingo were motivated to persecute the respondents because of a political opinion that the respondents possess, or are believed to possess. See *Id.* In this matter, it appears that the threats the respondents received and the harm the lead respondent suffered were motivated solely by Magjik Bingo's fear that the lead respondent's husband would reveal the tax fraud committed by Magjik Bingo, rather than the respondents political opinion.

Additionally, the respondents argue their membership in a particular social group, i.e., a family known for opposing the government, as a basis for the persecution that they have suffered and their fear of return to Albania. In this regard, the lead respondent testified that she was born into a family that was persecuted by the Communist regime (Tr. at 40). The respondent maintains that her grandfather was killed for his opposition to the Communist regime in 1944 and that her family was. involved in a democratic revolution in 1991 (Tr. at 40-42, 71). As a result of his involvement in the revolution, the respondent's father was detained and beaten (Tr. at 71). Based upon the lead respondent's testimony, we find that the respondents have failed to meet their burden of proof to *provide sufficient* evidence establishing that they suffered past persecution or have a well-founded fear of return to Albania on account of their membership in a particular social group. The respondents have failed to establish a nexus between their alleged identification as a family known for its opposition to the government and the threats and harm that the respondents suffered. Accordingly, we find that the respondents have failed to produce evidence from which it is reasonable to conclude

that the threats they received and harm they suffered were motivated, at least in part, by an actual or imputed protected ground of persecution. *See Matter of S-V , supra; Matter of S P-, supra.*

Considering the foregoing, we find that the respondents have failed to meet their burden of proof to establish eligibility for asylum. Inasmuch as the respondents have failed to meet the burden necessary to establish their eligibility for asylum, it follows that they has also failed to satisfy the higher standard required for withholding of removal or relief under the Convention Against Torture. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1487). Accordingly, the respondents' appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Philadelphia, Pennsylvania

File 78 191 373 July 8, 2002

IN REMOVAL PROCEEDINGS
In the Matter of SILVANA GERMENJI. Respondent

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT: Marco Pignone, III, Esquire

ON BEHALF OF SERVICE: Pamela Ransome, Esquire

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondents are both natives and citizens of Albania who arrived in the United States on September the 11th, 2000. They were charged as being arriving aliens after being placed in removal proceedings. The respondents through counsel admitted the allegations of fact and conceded the charge of removability listed on each Notice to Appear. The respondents are applying for asylum, restriction on removal and withholding under the Torture Convention. Insofar as the respondents are arriving aliens they are statutorily ineligible for voluntary departure.

The Court has been provided with both the country conditions as well as the Profile of Asylum Claims and

Country Conditions by both the Immigration Service and by the respondent. Besides considering the State Department reports, the Court also considers the credibility of the information the respondent presents in her application for asylum and determines any discretionary aspects of the case that may exist.

In the instant case the female respondent has submitted the application for asylum and her son is a derivative applicant. In these proceedings the respondents bear the evidentiary burdens of proof and persuasion in applications for restrictions on removal or asylum. An alien who is seeking restriction on removal to any country must show that their life or freedom would be threatened in that country based on race, religion, nationality, membership in a particular social group or political opinion. In order to make that showing the respondent must establish a clear probability of persecution on account of one of those enumerated grounds. This clear probability standard requires a showing that is more likely than not that the respondent would be subject to persecution.

The restriction on removal is mandatory. Thus, once an alien has established qualification for that relief and if he or she is not ineligible under the provisions of Section 241(b)(3) of the Act the relief must be granted and that individual cannot then be returned to the country where he or she would face persecution. The respondents, however, may be deported to another country under certain circumstances. In this regard restriction on removal differs from asylum, the granting of which is discretionary.

An alien who is seeking such a discretionary grant of asylum must demonstrate status as a refugee as defined by Section 101(a)(42) of the Act. That definition includes the requirement that they demonstrate unwillingness or inability to return to their country because of persecution or well-founded fear of

persecution based on race, religion, nationality, membership in a particular social group or political opinion. The requirement is met by a showing of circumstances under which a reasonable person would fear persecution.

Accordingly, in determining whether the respondents are eligible for asylum their subjective mental state must be considered against a background of circumstances prevailing in their own country. The objective reasonableness of the respondent's fears can be based on what has happened to others similarly situated as reported in current Department of State reports or other reliable sources. In some cases, the only available evidence of the respondent's objective fears may be their own testimony. This can suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible, coherent account of the basis of the respondent's fears. This does not mean, however, that the introduction of supporting evidence is merely at the respondent's option. Generally, such evidence must be presented when available. This is particularly true when the basis of the respondent's asylum claim is based on allegations of general conditions in their country of origin. In such cases, corroborative background evidence may well be essential. Finally, not just any fear of persecution will suffice to sustain the respondent's burden. The objectively reasonable possibility of persecution on account of a ground specified in Section 101(a)(42) of the Act and an alien's subjectively reasonable fear of experiencing that persecution, both must be established.

In addition to establishing eligibility for a grant of asylum, an applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. To meet that burden they should present evidence on any positive factors they believe will support the favorable exercise of

discretion. Assuming eligibility for asylum has been established, another factor to be considered in the exercise of discretion is whether the respondents have relatives legally in the United States or other personal ties to this country which would motivate them to seek asylum here rather than elsewhere. The extent to the alien's ties to other countries in which they do not fear persecution should also be examined.

In the instant case, the female respondent was the only individual to testify. The respondent asked the Court to excuse her son from listening to the testimony and since there was no objection from the Government that Court obliged the respondent and the young boy was excluded from the proceedings pursuant to her request.

The respondent was asked by counsel why she left Albania and she stated that her family has been persecuted in the past in that country. She stated that her grandfather died in the year 1944 and alleges that the Communists killed him. She admitted to the Court that Nazis were occupying the country at that time. However, apparently there was a political meeting at which her grandfather was in attendance and notwithstanding the German Nazi occupation the Communists attacked this meeting and killed a number of individuals who were opposed to the Communists, including the respondent's grandfather.

Respondent testified that she is married to Robert Germenji who lives in Albania. They have one son who is her corespondent. The respondent's husband worked for the Albanian Tax Bureau in Tirana. Fist he worked as a regular tax inspector and then became a chief tax inspector for the area serviced by the Tirana office. Her husband's duties were to compile tax reports for the entire Tirana district.

The respondent testified that in 1998 her husband was reviewing the tax returns of a lottery company called the Magic Bingo. The husband apparently was conducting an

investigation and discovered that this Magic Bingo company was concealing income and evading certain taxes. The husband met with his superior, one Koco Graba, who is the head of the Tax Bureau and told him of the findings concerning the Magic Bingo company and his investigation. Koco Graba told the respondent's husband to stop his investigation since this company had a connection with the Socialist Party and the head of the Socialist Party, Fatos Nano also had some type of connection to the Magic Bingo concern. The respondent's husband went over the head of his supervisor, Mr. Graba, and spoke to someone higher up in the ministry of Finance. However, he did not receive any assistance from that individual. Rather, that individual told him to return and discuss the matter further with Koco Graba.

At this time, according to the respondent's testimony, her husband started receiving telephonic threats telling him to stop his investigation. She states that the threats also referenced the respondent as well as her son as well as her husband himself. Her husband continued his job as chief inspector until April 1998 when he was reassigned to a less position as a regular inspector o taxes in Tirana. The respondent told the Court that this was a demotion.

In August 1999 the respondent, her husband and son left Albania and went to live in Greece where they stayed for two years. She states that for the most part her husband was unable to get a job and she had a job caring for a lady and received housing as well as a salary for her efforts. She stated that while in Greece she and her family attempted to apply for residency in that country but were turned down. In April of 2000 she and her family left Greece and returned to Albania.

After returning to Albania, from April 2000 until August of that year, the respondent and her family had no problems at all. However, in August 2000 the respondent stated that she was going to her mother's house. She was walking along the street and noticed that a car driving very slowly was following her. She arrived at her mother's house, stayed for a while and then left, using a deserted street near where her mother lived. The same car that she noted earlier started following her again and three masked me exited the car and tried to abduct her by pulling her into the automobile. Respondent states they cursed her and stated that what they were doing was because of her husband and what her husband had done to them. They also stated as they were allegedly struggling with her that she had been observed by them. The respondent stated that they tried to pull her into the car. However, a neighbor came along and pulled her away from them, thus effectuating her escape.

The respondent stated to the Court clearly that during this episode her eyes were covered and "she felt a darkness overpower her." The respondent then apparently changed the testimony and denied to the Court that she was ever blindfolded, stating that it was a state of mind that, that she had encountered and that the whole world had turned black. The Court is persuaded that the respondent had indeed changed her testimony. It was clear that she told the Court that her eyes were covered and why she decided to change that testimony during the hearing is unknown to this Court.

The respondent further testified concerning this helpful neighbor, that he pulled her away from her attackers by pulling the back part of her blouse, her neck and her shoulders. He also yelled to the other neighbors far assistance and when the neighbors arrived the attackers departed. Before leaving, however, the attackers warned the respondent that they were not finished with her yet.

The respondent was asked whether or not she reported the incident to the police and she answered in the negative and stated that she did not do so since she thinks that she would have to explain everything to them, that is the police, that had been told to her by her husband, that is, the basis and the reason behind these people attacking her. Then the respondent stated that the police knew what had happened and why it had happened. Consequently, her explanation as to why she did not tell the police makes absolutely no sense at all if indeed they already knew that history that her husband had with these individuals who attacked her.

The respondent left Albania on September the 8th, 2000. She states if she returns to her country she will be killed by the same people who attacked her in August 2000. She's further testified that her husband is presently doing manual labor jobs in Albania and moves around that country a lot. States that after her husband returned to Greece he worked in a local government's payroll department for about five or six months. She further opined that her husband continues to receive threats by people who threatened to kill him if he opens his mouth concerning the investigation that he had previously done.

The respondent concluded her direct testimony by telling the Court that she believes her father was photographed during demonstrations in 1991 which were anti-Communist in nature. This would have been, naturally, before, immediately before the fall of the Communist government. She states that in February 1991 the police arrested him and kept him incarcerated for a day and beat him before releasing him.

On cross-examination the respondent informed us that her husband was a regular inspector with the Albanian Tax Bureau from 1993 until 1995 and promoted in 1995 to Chief Inspector, which position he enjoyed until April of 1998. The Court notes that from the State Department reports that in June 1997 the Socialist Party won the election in Albania. The Court further notes that the respondent's husband was allowed to keep his job as Chief Tax Inspector notwithstanding the fact that the Socialists had now taken control of the government. Even after the husband was demoted to a regular tax inspector he was still allowed to keep his government job notwithstanding the fact, again, that the Socialist government was now in place in Albania.

Continuing on cross-examination, the respondent admitted that for the four months preceding her departure from Albania she lived in her home along with her husband and child. Her husband and the respondent both worked during that period and her child was attending school. The respondent as well as her husband both had good jobs. The respondent was an accountant also. During that period of time nothing happened to the respondent or her family. It is the opinion of the Court that if anyone wished to harm the respondent or her family they would have had ample opportunity during this period of time to do so insofar as they knew where the respondent and her family lived and they knew where to find them while they were working. Nothing, again, happened to this family during that period of time.

The Court noted that the respondent's affidavit, which has been marked as Exhibit 3, reflects concerning the attack upon her in August of 2000 that two men helped her. An elderly man first who argued with her attackers while another man caught her from behind by her arms. The Court further noted in its questioning of the Court that the respondent never testified today that an elderly man helped her originally. The respondent, on the other hand, stated to the Court that the man

who pulled her by her shoulders *in an* attempt to remove her from the grasp of her attackers, was the first man to help her. The Court also noted that there was nothing in the respondent's affidavit to the effect that her attackers were masked. This would appear to be an extremely important detail of this scenario as presented by the Court and not one that would have been easily forgotten by an individual who was executing an affidavit. The respondent made a futile attempt to explain the discrepancies between her affidavit and her testimony before the Court and the Court does not find those to be a credible explanation.

The Court has reviewed Exhibit 5, Tab L, which is the affidavit of the individual who allegedly helped the respondent when she was being attacked by the three masked men. That individual in his affidavit mentions doing nothing other than calling for help for the respondent from the neighbors in the area. He makes absolutely no mention of grabbing a hold of her and trying to remove her from her attackers and states only that he called for help. Again, if indeed the scenario as presented by the respondent were accurate the Court is sure that there would be some resemblance between the respondent's testimony and the affidavit that was executed by this man who allegedly saved her. However, the Court sees no resemblance.

The credibility of the respondent is of extreme importance in assessing her claim. The Court cannot find that the respondent is a credible witness nor that she has presented a credible case for the relief that she has requested for the reasons that have heretofore been set forth in this decision.

The Court also is concerned with the accuracy of Exhibit 4, Tab G, a xerox copy of a newspaper called Liria. It appears to the Court that this copy has been altered with the addition of two names, out of numerical sequence, at numbers 218 and 219. It appears to the Court from the naked eye

that those two names had been somehow superimposed upon an original document and then xeroxed to produce this finished product which was not artfully done in the first place.

Assuming arguendo that I had found that the respondent were credible, and, again, this was not the case, the respondent's testimony was incredible, as was her case-in-chief. But assuming that it was credible the Court finds that she has never been persecution for one of the five statutory grounds for such a grant of asylum or withholding of removal. Both the respondent *and* her husband were professionals and had good jobs in Albania. Her husband worked for the Tax Bureau both under the Democratic government as well as the Socialist government of Albania. It is alleged by the respondent that uncovered corruption and tried to inform his superior of the corruption which his investigation was able to discover. However, apparently, again, according to the allegations made by the respondent, his discoveries made him enemies in the city where he was working. However, no proof has been given to the court exactly who these enemies were. The court cannot conclude that it was the government or any member of the government that set upon the respondent in August of 2000 and tried to kidnap her.

According to the testimony that the Court has heard the Court can conclude that the respondent's wife was the victim of individuals who were injured somehow by her husband's investigation. The Court cannot conclude or even hazard a guess as to who these individuals were. However, this is not persecution as that term is defined in the Act. Based on the State Department reports the Court understands the violent nature of life in Albania. The Court understands that there are many killings in that city as well as kidnapings, all having to do with street crime in general and

an attempt by individuals to get ransom for the individuals that they kidnaped. Based on the State Department reports the Court cannot conclude that, if indeed it occurred to begin with, the attempted kidnaping of the respondent had anything at all to do with her husband's job. It quite possibly could have just been street crime. Again, the Court does not have the evidence necessary to conclude it had its basis in the investigation that her husband had been conducting.

Likewise, the Court does not find that there has been a pattern or practice of persecution of the respondent's family by the Communists in Albania which continued right up until the time that the respondent left that country.

Assuming arguendo that I had found the credible, assuming arguendo that I had found that the respondent had indeed had suffered past persecution this Court under 8 C.F.R 208.13 would, of necessity, again deny the application insofar as there has beer. a fundamental change in circumstances to the effect and to the extent that the respondent would no longer have a wellfounded fear of persecution in her country of nationality. The respondent's husband is no longer of the Tax Bureau. The respondent's husband can no longer conduct investigations concerning tax money that is owed to the government or any evasion of the tax laws of Albania. There is no reason, in the Court's considered opinion, why anyone would wish to harm him now since, again, he is powerless to conduct any further investigations or cause them any further problems with regard to violations of the tax code in Albania.

For all these reasons the Court finds that the respondents have not established a well-founded fear of persecution as defined if they were returned to Albania. Accordingly, their application for asylum will be denied.

Because the respondent's have failed to establish a wellfounded fear of persecution as is necessary in order to be statutorily eligible for asylum it is unnecessary to consider whether they merit such a relief as a matter of discretion. Furthermore, because they have failed-to establish eligibility for asylum and they have, moreover, failed to meet the higher standard of proof necessary for restriction on removal into Albania. Moreover, based on the testimony and the evidence in the record the Court finds that the respondents have not shown that they are more likely than not to be tortured if they are returned to Albania.

The last issue before the Court is the issue of the respondent possibly having filed a frivolous application for asylum. In the instant case the Court has noted numerous discrepancies between the respondent's testimony and the affidavit that she has submitted to the Court as well as discrepancies between her testimony and the affidavit submitted to the Court by the individual who allegedly saved her from her kidnapers.

This lack of credibility is further compounded by a feeble attempt on the respondent's part to submit a doctored document, a document that has been altered, to the Court to support her claim. The Court is convinced that the respondent has indeed filed a frivolous application and the Court is further convinced the respondent should be punished for committing this offense before the Court by being forever barred, along with her son, from any further traps back to this country.

The Court will refrain from finding that the respondent has filed a frivolous application for asylum for only one reason and that reason is that her son is of tender years. Apparently, he is in the United States going to school and, as far as I can tell, he's been quite Americanized. He

speaks English very well. If I am to find, or were to find that the respondent had filed a frivolous application the respondent's son would be penalized for something that she had the temerity of doing to this Court, that is fraud. Consequently, the Court will not find that there is a frivolous application. The Court will, rather, order that the respondent's be removed from the United States back to Albania insofar as they are statutorily ineligible for voluntary departure.

Accordingly, the following orders will be entered.

ORDERS. IT IS ORDERED that the respondents' request for asylum under Section 208 of the Immigration and Nationality Act be and is herein denied.

ORDERS. IT IS FURTHER ORDERED respondent application for restriction on removal to Albania under Section 241(b)(3) of the Immigration and Nationality Act be and is herein denied.

ORDERS. IT IS FURTHER ORDERED that respondents' application for withholding of removal under the Torture Convention pursuant to 8 C.F.R 208.16 be and is herein denied.

ORDERS. IT IS FURTHER ORDERED that the respondent be removed from the United States to Albania.

/s/ Donald Vincent Ferlise
DONALD VINCENT FERLISE
Judge, United States Immigration Court
July 8th, 2002

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT
No: 04-1531

SILVANA GERMENJI;
ROXHERSI GERMENJI, Minor Child,
Petitioners
v.
ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA

PRESENT: SCIRICA, Chief Judge, SLOVITER,
NYGAARD, ALITO, ROTH, McKEE,
RENDELL, BARRY, AMBRO, FUENTES, SMITH,
FISHER, VAN ANTWERPEN Circuit Judges

SUR PETITION FOR PANEL REHEARING WITH
SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Theodore A. McKee
Circuit Judge

DATED: August 5, 2005